MARIO N. ALIOTO, ESQ. (56433)
LAUREN C. RUSSELL, ESQ. (241151)
TRUMP, ALIOTO, TRUMP & PRESCOTT, LLP
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200
Facsimile: (415) 346-0679
malioto@tatp.com
laurenrussell@tatp.com

JOSEPH M. PATANE, ESQ. (72202)
LAW OFFICE OF JOSEPH M. PATANE
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200
Facsimile: (415) 346-0679
jpatane@tatp.com

Attorneys for Plaintiff
[Additional Attorneys Appear On Signature Page]

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ADRIENNE BELAI, on behalf of herself and all others similarly situated, Plaintiff, vs. WALMART.COM USA LLC, WAL-MART STORES, INC., AND NETFLIX, INC., Defendants.	Case No. CV 09 1740 EMC **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT

Plaintiff Adrienne Belai ("Belai") on behalf of herself and all others similarly situated in the United States brings this action for treble damages and injunctive relief under the federal antitrust laws of the United States against Defendants Netflix, Inc. ("Netflix"), Wal-Mart Stores, Inc. ("Wal-Mart Stores"), and Walmart.com USA LLC ("Walmart.com") (collectively "Defendants"), demanding trial by jury, and complaining and alleging as follows:

NATURE OF THE CASE

1. This lawsuit is brought as a class action on behalf of all consumers in the United States who paid a subscription fee to rent DVDs from Netflix during the period from May 19, 2005 through the present (the "Class Period").

2. This antitrust class action arises out of a conspiracy among Defendants Netflix, Wal-Mart Stores, and Walmart.com to divide the markets for the sales and online rentals of DVDs in the United States in order to avoid competition, and to monopolize and illegally restrain trade in at least the Online DVD Market, as further defined below.

3. On or about May 19, 2005, Netflix, Wal-Mart Stores, and Walmart.com, a wholly-owned subsidiary of Wal-Mart Stores, entered into an agreement to divide the markets for the sales and online rentals of DVDs in the United States ("Market Division Agreement").

4. Prior to the Market Division Agreement, Defendants competed in the Online DVD Rental Market. Under the Market Division Agreement, Wal-Mart Stores and Walmart.com agreed to exit the Online DVD Rental Market and to stop competing with Netflix and, in return, Netflix agreed not to enter into the new DVD sales market, but instead promote the DVD sales of Wal-Mart Stores and Walmart.com.

5. Defendants' Market Division Agreement effectively eliminated competition in the Online DVD Rental Market and enabled Netflix to charge its subscribers higher subscription prices for the online rental of DVDs than it otherwise would have. As a result of Defendants' contract, combination of efforts, and conspiracy, as well as Netflix's unlawfully acquired and maintained market and monopoly power, Plaintiff and millions of other similarly situated

consumers paid more, and continue to pay more, for the online rental of DVDs than they would have otherwise paid in the absence of Defendants' unlawful conspiracy.

6. Plaintiff alleges that Defendants' Market Division Agreement is in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, which prohibit unreasonable restraints of trade and monopolization. Plaintiff seeks treble damages and injunctive relief on behalf of herself and all other similarly situated consumers during the Class Period.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action based on Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) which confer to the United States district courts jurisdiction over actions seeking damages and costs, including reasonable attorneys' fees, for violations of the Sherman Act. Section 16 of the Clayton Act, 15 U.S.C. § 26, is the basis for this Court's jurisdiction over Plaintiff's claim for injunctive relief. This Court also has jurisdiction under 28 U.S.C. §§ 1331 and 1337.

8. This Court has personal jurisdiction over Defendants because they systematically and continually conduct business in the United States, including marketing, advertising, and sales directed to residents here.

9. Venue is laid in this District pursuant to 15 U.S.C. §§15 and 22, and 28 U.S.C. § 1391(b) and (c). Venue is proper in this judicial district because during the Class Period one or more of the Defendants resided, transacted business, was found, or had agents in this district, and because a substantial part of the events giving rise to Plaintiff's claims occurred in this district, and a substantial portion of the affected interstate trade and commerce described below has been carried out in this district.

DEFINITIONS

10. As used herein, "DVD" refers to a Digital Video Disc or Blu-Ray Disc containing commercially recorded entertainment programs for personal viewing. DVD does not refer to blank Digital Video Discs which are used to store or record data.

11. As used herein, the term "Online DVD Rental Market" shall mean the market for the rental of DVDs online by subscription and delivery by mail.

12. The "Class Period" or "relevant period" means the period from at least May 19, 2005 and continuing through the present.

13. "Person" means any individual, partnership, corporation, association, or other business or legal entity.

PLAINTIFF

14. Plaintiff Adrienne Belai is an individual consumer who resides in California. During the relevant period, Ms. Belai subscribed directly to Netflix for her personal, noncommercial use, and has been injured by reason of the antitrust violations alleged in this Complaint.

DEFENDANTS

15. Defendant Netflix is a Delaware corporation headquartered at 100 Winchester Circle, Los Gatos, California 95032. Netflix rents DVDs directly to consumers nationwide through its website, www.netflix.com. Netflix charges its subscribers a monthly subscription fee and offers various subscription plans. Since starting its online DVD rental business in 1999, Netflix's total subscribers have grown at a compound annual rate of 70% reaching about 10 million in 2007. Its revenues earned from engaging in interstate commerce exceed $1 billion annually. Throughout the Class Period, Netflix has possessed a market share of at least 75% of the Online DVD Rental Market in the United States.

16. Defendant Wal-Mart Stores is a Delaware corporation headquartered at 702 S.W. 8th Street, Bentonville, Arkansas 72716. Wal-Mart Stores is the largest retailer in the United States with revenues of approximately $400 billion annually. Through its retail stores and its website, www.walmart.com, Wal-Mart Stores sells DVDs directly to consumers nationwide. Wal-Mart Stores sells far more DVDs than any other retailer in the United States, accounting for about 40% of all new DVDs sold to consumers domestically. Prior to the Market Division Agreement, Wal-Mart Stores' wholly-owned subsidiary Walmart.com competed with Netflix in the Online DVD Rental Market through the "Walmart DVD Rentals" service, which was available on www.walmart.com.

17. Defendant Walmart.com is a wholly-owned subsidiary of defendant Wal-Mart Stores. Walmart.com is a Delaware company with its headquarters at 7000 Marina Boulevard, Brisbane, California 94005. It is the online component of Wal-Mart Stores' retail empire that is the leading seller of new DVDs in the United States. Prior to the conspiracy alleged herein, Walmart.com was also a major competitor of Netflix in the Online DVD Rental Market through the "Walmart DVD Rental" service, which was available on www.walmart.com. While its financials are not publicly reported by Wal-Mart Stores, Walmart.com is ranked as the 14th largest online retailer in the United States. Through the website, www.walmart.com, Walmart.com sells DVDs directly to consumers nationwide. Consumers who purchase DVDs via www.walmart.com may either have them mailed or otherwise delivered to them directly, or may pick them up at a Wal-Mart Stores retail location through Walmart.com's and Wal-Mart Stores' "Site to Store" program.

18. Wal-Mart Stores and Walmart.com are, in essence, completely integrated and operate as a single commercial enterprise, and they hold themselves out to the public as such. Walmart.com is an internet sales channel for Wal-Mart Stores, rather than being an independent business entity. Wal-Mart Stores is the registrant of the www.walmart.com domain name that is used to sell products and services by Walmart.com. Likewise, Wal-Mart Stores is the registrant of www.walmartdvdrentals.com. Wal-Mart Stores' Chief Marketing Officer John Fleming has explained the relationship between Wal-Mart Stores and Walmart.com as follows: "Wal-Mart Stores set up Walmart.com as a separate company with some outside investors, but within six months Wal-Mart Stores bought back the outside interest and Walmart.com; Walmart.com now serves as a 'marketing channel' for Wal-Mart Stores."

19. Wal-Mart Stores was actively involved in the conspiracy alleged herein, as alleged more specifically below. For purposes of these allegations, both Wal-Mart Stores and Walmart.com are active participants in the conspiracy and each is liable for the unlawful conduct alleged herein, with each, among other things, participating in, and benefiting from, the Market Division Agreement. Moreover, Wal-Mart Stores directed, ratified, approved, supported and otherwise aided and abetted Walmart.com's violations of law.

UNNAMED CO-CONSPIRATORS

20. On information and belief, various other trade associations, persons and/or entities, not named as Defendants herein, have participated as co-conspirators with Defendants and have performed acts and made statements in furtherance of the conspiracy and/or in furtherance of the anticompetitive, unfair or deceptive conduct alleged herein. The allegations in this Complaint apply equally to these unnamed co-conspirators.

21. Whenever in this Complaint reference is made to any act, deed or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of the corporation's business or affairs.

22. Each of the Defendants named herein acted as the agent or joint venturer of or for the other Defendants with respect to the acts, violations and common course of conduct alleged herein. Each Defendant ratified and/or authorized the wrongful acts of each of the Defendants. Defendants, and each of them, are individually sued as participants and as aiders and abettors in the improper acts and transactions that are the subject of this action.

INTERSTATE TRADE AND COMMERCE

23. Throughout the Class Period, the DVDs purchased and/or rented from Defendants by Plaintiff and the other Class members created a continuous and uninterrupted flow of transactions throughout the United States, including this District. Defendants' unlawful conduct took place within the flow of interstate commerce and affected consumers located throughout the United States, including this District. Defendants' unlawful conduct had a direct, substantial, and reasonably foreseeable effect in restraint of trade on interstate commerce.

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this action on behalf of herself and as a class action under the provisions of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the following class:

Any person in the United States that paid a subscription fee to Netflix to rent DVDs at any time from at least May 19, 2005 through the present, the exact dates being unknown to Plaintiff. Excluded from the Class are Defendants, their co-conspirators, all present or former parents, predecessors, subsidiaries or affiliates of Defendants, and all governmental entities. Also excluded is any judicial officers presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

25. This action has been brought and may properly be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure for the following reasons:

a. The Class is ascertainable and there is a well-defined community of interest among members of the Class;

b. Based upon the nature of trade and commerce involved and the number of consumers who purchased Netflix subscriptions during the Class Period, Plaintiff believes that the members of the Class number in the thousands, and therefore are sufficiently numerous that joinder of all Class members is not practicable;

c. Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff and Class members overpaid for a subscription to Netflix, and therefore Plaintiff's claims arise from the same common course of conduct giving rise to the claims of the members of the Class and the relief sought is common to the Class;

d. The following common questions of law or fact, among others, exist as to the members of the Class:

i. Whether Defendants formed and operated a combination or conspiracy to allocate the Online DVD Rental Market in the United States;

ii. Whether Defendants unreasonably restrained trade in the Online DVD Rental Market;

iii. Whether Defendants intended for Netflix to monopolize the Online DVD Rental Market;

iv. Whether Defendants' combination or conspiracy caused subscriptions for online DVD rental from Netflix to be more costly than they would have been in the absence of Defendants' conduct;

v. The operative time period of Defendants' combination or conspiracy;

vi. Whether Defendants' conduct caused injury to the business or property of Plaintiff and the members of the Class;

vii. Whether Defendants' conduct violates Section 1 of the Sherman Act;

viii. Whether Defendants' conduct violates Section 2 of the Sherman Act;

ix. The appropriate measure of the amount of damages suffered by the Class; and

x. The appropriate nature of class-wide equitable relief.

e. These and other questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages;

f. After determination of the predominant common issues identified above, if necessary or appropriate, the Class can be divided into logical and manageable subclasses;

g. Plaintiff will fairly and adequately protect the interests of the Class in that Plaintiff has no interests that are antagonistic to other members of the Class and has retained counsel competent and experienced in the prosecution of class actions and antitrust litigation to represent her and the Class;

h. A class action is superior to other available methods for the fair and efficient adjudication of this litigation since individual joinder of all damaged Class members is impractical. The damages suffered by the individual Class members are relatively small, given the expense and burden of individual prosecution of the claims asserted in this litigation. Thus, absent the availability of class action procedures it would not be feasible for Class members to redress the wrongs done to them. Even if the Class members could afford individual litigation, the court system could not. Further, individual litigation presents the potential for inconsistent or contradictory judgments and would greatly magnify the delay and expense to all parties and the court system. Therefore, the class action device presents far fewer case management difficulties and will provide the benefits of unitary adjudication, economy of scale and comprehensive supervision in a single court; and

i. Defendants and their co-conspirators have acted, and/or refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

RELEVANT MARKET

26. Defendants' market allocation conspiracy is *per se* illegal and requires no allegation of market definition.

27. For those claims that may require market definition, the Relevant Market for purposes of these allegations during the Class Period at least is: the Online DVD Rental Market in the United States.

28. DVDs are the primary medium by which movies and other recorded entertainment are distributed in the United States. Revenues on DVDs far exceed those generated from box office receipts. In addition, DVDs have become a particularly lucrative means for the distribution of previously aired television programs, surpassing even television syndication rights as a revenue stream in many instances.

29. The Relevant Market is for the rental of DVDs online by subscription for delivery by mail. At all relevant times, there have been no reasonably interchangeable substitutes for this service, which is differentiated from both the demand and supply side from other methods of DVD distribution as well as other methods of entertainment.

30. In the Online DVD Rental Market, for a monthly subscription fee, a consumer may rent DVDs from an online service provider, such as Netflix, Blockbuster Online ("Blockbuster"), or (prior to May 19, 2005) Walmart DVD Rentals. There are no late fees and no due dates, but, within any given plan, the consumer pays the subscription fee regardless of how many DVDs he or she rents per month. Thus, even a consumer who doesn't rent a DVD for months is still charged a subscription fee. Netflix CEO Reed Hastings calls this the "gym membership effect."

31. To rent DVDs, consumers fill out a rental "queue" in their online profile, listing in order of preference the DVDs they wish to rent. The DVDs are then sent by the provider to the consumer's home via U.S. mail. To return the DVD and receive the next DVD in the queue, the consumer inserts the DVD in a prepaid envelope provided with the rental and mails it back. The service provider then mails the next movie on the list to the consumer. The library of titles available from online service providers has grown over time and now ranges near 100,000 DVDs. This is twenty to one-hundred times the selection of titles stocked (not to mention available) at any single video rental store.

32. From the consumer's prospective, online DVD rental is a differentiated service that is not reasonable interchangeable with traditional bricks-and-mortar video rental. In traditional video rental from physical stores, consumers drive to or otherwise go to the store, find (or do not find) what they are looking for, and pay on a per-DVD basis for their selection(s). After the designated rental period of one or more days, usually depending upon the release date of the DVD, the consumer returns the selection or potentially incurs a late fee. During the Class Period as alleged herein, these late fees have accounted for as much as 20% of the revenues in traditional video rental stores. There are no late fees or due dates in the Online DVD Rental Market.

33. There are numerous other factors which differentiate the Online DVD Rental Market from other forms of DVD rental, such as in-store, kiosk, or video downloading:

a. Price Competition: There is no direct price competition between the online rental and other forms of DVD rental. In the Online DVD Rental Market, consumers generally pay a monthly subscription, which is independent from the number of DVDs the consumers actually rents in a month. In contrast, in other forms of DVD rentals, the consumer usually pays for each individual DVD rental. Consequently, changes in the price of online rentals do not closely track changes in the price of in-store or other forms of rental. Furthermore, the pricing of online rentals is generally nationwide in scope and is not affected by local in-store prices and competition. As a result, the pricing of online rentals would generally be the same to a consumer regardless of whether the nearest rental store is two minutes away or two hours away. Online DVD Rental providers also offer additional services, such as movie reviews, customer-specific recommendations based on viewing and preference history and other metrics of popularity. Thus, online rental and other forms of rental are not reasonably interchangeable. The cross-elasticity of demand between these products is such that a small but significant non-transitory increase in price ("SSNIP") would not cause consumers to switch from online rental to in-store rental or any other method of DVD distribution and *vice versa.*

b. Functional Differences: Online DVD rentals function differently from in-store rentals in that (1) they do not require travel to a store; (2) are available to anyone with a postal address, regardless of proximity to a store; (3) are primarily subscription-based services; and (4) provide a much wider selection of titles than a traditional rental store. Online and in-store DVD rentals are therefore not reasonably interchangeable. Likewise, other modes of content distribution, such as kiosk, video on-demand, and downloading, among other forms, are also not reasonably interchangeable with online DVD rentals for a number of reasons. These reasons include relative selection and convenience for consumers, pricing, as well as, from the supply perspective, licensing considerations and technological limitations.

c. Public and Industry Perceptions: The public and the industry, including Defendants, recognize the Online DVD Rental market as a distinct market. For instance, a Netflix executive recently told the Wall Street Journal that other types of rental services, such as kiosk and in-store rentals, do not present a direct competitive threat to Netflix. That same executive acknowledged that, while video downloads may be a competitive force in the future, DVD will be the dominant medium for years to come, making entry of this alternative technology not timely enough to be considered a competitive force in the Online DVD Rental Market. Netflix CEO Reed Hastings has observed that the competitive threat of Internet downloading to online DVD rental during the Class Period is, like that of hydrogen-powered cars to gasoline powered cars, inconsequential for many years to come. He has further explained that DVDs will be the dominant medium for movies for perhaps as long as the gasoline engine.

34. The Online DVD Rental Market is also distinct from the market for DVD sales. The pricing of DVDs for retail sale and online DVD rentals is very different. Factors differentiating the Online DVD Rental Market from the new DVD sales market include:

a. Pricing: as discussed above, consumers who subscribe to online DVD rental services generally pay a monthly subscription fees. This fee does not vary based on whether the consumer is renting popular or obscure DVDs. In contrast, the price of DVDs for sale is heavily based on the popularity of the DVD, including whether it is a new release or how successful the title originally was at the box office or on television.

b. Market Recognition: the industry and the public perceive the online DVD Rental Market as a separate and distinct market from the new DVD sales market.

c. Different purposes: the factors motivating a consumer to buy a DVD are different from those that lead a consumer to rent a DVD. Consumers generally rent DVDs when they intend to view the DVD once; consumers buy a DVD when they intend to watch it multiple times. DVD rentals are also of no use to consumers who want to give a DVD as a gift or wish to collect DVDs.

d. Distinguishing Characteristics: DVDs sold at retail have other distinguishing characteristics, such as packaging and special features, which are not available with rentals. Online rentals are sent in plain envelopes that contain little information other than the title of the DVD. Moreover, whether a DVD is new or used is not an issue in rental, but is a significant factor in sales. Used DVDs are sold at a significant discount to their new counterparts because they are relatively less desirable to consumers.

35. Because the Online DVD Rental Market is distinct from the markets for other forms of rental or sales, there is little cross-elasticity of demand between these products and therefore a SSNIP does not cause consumers to switch from one market to another.

36. The geographic market for the Online DVD Rental Market is the United States. The practical reality is that, among other things, shipping costs and trans-global differences in DVD data encoding make it neither practical nor feasible for entities located in other countries to rent DVDs to U.S. consumers.

MARKET AND MONOPOLY POWER

37. Netflix dominated the Online DVD Rental Market at all times relevant to this complaint. Netflix's approximate market share of the Online DVD Rental Market is 75%, making it the clear market leader. As a result of this market share, Netflix has had, and continues to have, market and monopoly power in the Online DVD Rental Market. It has the power to control prices or exclude competition in this market.

38. Netflix's market and monopoly power is strengthened by the significant barriers to entry in this market. There have been no significant market entrants in the more than three years since the announcement of the Market Division Agreement, which increased those barriers. Online DVD rental is highly capital intensive. A firm must operate on a large scale to be successful. It requires a significant number of shipping facilities strategically located throughout the United States to ensure timely delivery. It also requires an extensive inventory of DVDs to maintain the selection of titles that consumers demand. As Netflix CEO Reed Hastings has observed, "[w]hen you think about the barriers to entry to this business, it is subtle because it appears easy. A kid can open a website. But the barriers to profitability are very large."

39. Since the implementation of the Market Division Agreement, discussed in detailed herein, the Online DVD Rental Market has been overwhelmingly comprised of only two firms: Netflix and Blockbuster Online. Netflix controls approximately 75% of the market and Blockbuster controls nearly all of the remaining 25%. A few minor firms have shares of less than 1-2% of the market. During fiscal years 2005-2007 combined, Netflix earned nearly $4 billion in revenues and $1.3 billion in gross profit from renting DVDs to consumers—a margin of more than 33%. As a result of Netflix's abuse of its monopoly power alleged herein, its subscription fees have been higher than they otherwise would have been.

40. Wal-Mart Stores and its wholly-owned subsidiary Walmart.com have a combined, industry-leading 40% of domestic DVD sales. During fiscal years 2005-2008 combined, they earned revenues in excess of $25 billion by selling DVDs to consumers. Both Wal-Mart Stores and Walmart.com benefit from the Market Division Agreement.

41. Further evidence of Netflix's market and monopoly power is reflected in the anticompetitive effects alleged herein.

THE ILLEGAL AGREEMENT

42. In early 2005, Netflix was coming off a year in which competition was growing and its stock price had dropped precipitously. It faced increasing competition from Walmart DVD Rentals and from Blockbuster, the latter of which had just entered the online rental market.

43. By mid-2004, Netflix was charging $21.99 for its most popular subscription rental plan. Blockbuster entered the online market in earnest in August, at first charging $19.99 but then reducing its price in November to $17.49 for its similar plan. After that, Walmart DVD Rentals rate was reduced from $18.86 to $17.36. In the wake of these price cuts, Netflix reduced its prices by nearly 20% (to $17.99 per month) soon thereafter. In response, Blockbuster further reduced its price to $14.99—20% below Netflix's already reduced price and more than 40% below the price Netflix was charging just months earlier.

44. Meanwhile, Wal-Mart Stores and its wholly-owned subsidiary Walmart.com, which had established themselves as the leader in new DVD sales, were facing increasing competition from in-store and online channels of distribution in new DVD sales, including competition from Amazon.com. At the time, Netflix was a significant potential additional competitor, since it had the subscriber base of millions of consumers who were known in the industry to be prolific DVD buyers. The sales and profits of Wal-Mart Stores and Walmart.com stood to suffer if Netflix began to sell new DVDs to these customers. Conversely, Wal-Mart Stores and Walmart.com stood to gain significant additional sales and profits and to gain further market share in the sale of new DVDs if these customers were to make their purchases of new DVDs from them instead.

45. On January 7, 2005, Walmart DVD Rental dropped the price on its most popular DVD rental plan to $12.97 per month creating further price pressure on Netflix to reduce its DVD rental prices. In order to respond to the increased competition, Netflix would have been forced to lower its prices and thereby reduce its profits.

46. Faced with this increasing competition, Reed Hastings, the Chairman and CEO of Netflix, called John Fleming, the then-CEO of Walmart.com, and invited him to dinner to discuss their companies' DVD sales and rentals business. In Hastings' own words, having "noticed how low Wal-Mart's prices [for DVDs] were," he "called the CEO [of Walmart.com] in January and asked if they could have dinner." Fleming, who reported to Wal-Mart Stores CEO Lee Scott, accepted the invitation. The two men met together in January 2005 and embarked upon a scheme that would result in the contract, combination, and conspiracy reflected in the Market Division Agreement.

47. On May 5, 2005, in Netflix's First Quarter earnings call with financial analysts, only two weeks prior to the public announcement of the Market Division Agreement, Hastings made plain the motive for Netflix to conspire with Wal-Mart Stores and Walmart.com:

> In terms of profitability over the coming years, the key issue is the number of major competitors. If there are only two major players, Netflix and Blockbuster, the profitability may be substantial like other two-firm entertainment markets. If, on the other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in online rental, then profits would likely be small.

48. Hastings went on to "predict" on the conference call that, "the likely case is online rental becomes a two-firm market over the coming years."

49. Under the Market Division Agreement, Netflix, Wal-Mart Stores and Walmart.com agreed that they would restrain trade and eliminate competition. Wal-Mart Stores and Walmart.com agreed that Walmart.com would stop competing with Netflix in the online rental market. Netflix agreed that it would not sell new DVDs, but instead would promote the new DVD sales of Wal-Mart Stores and Walmart.com. In agreeing to promote the sale of DVDs by Wal-Mart Stores and Walmart.com, Netflix provided consideration for the agreement by Wal-Mart Stores and Walmart.com that Walmart.com would exit the Online DVD Rental Market. This simultaneously confirmed to Wal-Mart Stores and Walmart.com that Netflix would not enter the market to sell new DVDs online, since Netflix was well-positioned and otherwise had the unilateral economic incentive to do so.

50. On May 19, 2005, shortly after Fleming had been promoted to Chief Marketing Officer of Wal-Mart Stores, Defendants issued a joint press release that revealed the existence of the Market Division Agreement, by which they unlawfully divided and allocated the markets for DVD sales and rentals, and did, in fact, create the two-firm market that Hastings sought.

51. The news of the agreement was featured in a number of newspapers and other publications, in articles with aptly colorful titles, including:

a. "Wal-Mart and Netflix Scratch Each Other's Backs;"

b. "Truce in DVD-Rental Wars;"

c. "Wal-Mart and Netflix: An Alliance;" and

d. "Wal-Mart Loves Netflix: And Vice-Versa."

52. Beginning on May 19, 2005, Walmart.com, as agreed, did in fact exit the online rental business. Walmart.com announced to all of the subscribers to "Walmart DVD Rentals" that it was exiting the online DVD rental market and that subscribers could be transferred to Netflix. Walmart.com took additional steps to affirmatively implement the Market Division Agreement by adding a prominently placed link to the Netflix website to encourage customers to transfer their subscriptions to Netflix. Since the date of their joint announcement on May 19, 2005 (apart from the 30 days that Walmart.com used to wind down its existing online rental business), neither Walmart.com nor Wal-Mart Stores has participated in the Online DVD Rental Market, and Netflix has not sold new DVDs.

53. As a result of the Market Division Agreement, downward pricing pressure from Walmart.com was eliminated and the Online DVD Rental Market was reduced to two competitors. Absent the Market Division Agreement, Netflix would have lowered its prices no later than May 19, 2005. As a result of the elimination of a competitor in this Relevant Market, Blockbuster was able to raise its subscription price in July to match that of Netflix, from $14.99 per month to $17.99 per month. This confirmed Hastings' expectation that "[i]f there are only two major players, Blockbuster and Netflix, the profitability may be substantial like other two-firm entertainment markets." In Netflix's next earning's call, on August 8, 2005, Hastings

boasted, "[l]ast quarter we said online rental was shaping up to be a two-player market, and that is indeed what is happening."

54. The Market Division Agreement served to entrench and enhance Defendants' dominant market positions and otherwise harm competition, including enabling Netflix to charge higher subscription prices for online DVD rentals than it would have had they not entered into the agreement. Plaintiff and other similarly situated consumers in fact paid the higher subscription prices to Netflix as a result.

55. The Market Division Agreement was not in the independent self-interest of Wal-Mart Stores, Walmart.com or Netflix. Neither Wal-Mart Stores nor Walmart.com would have wanted Walmart.com to withdraw from the online rental market, encourage its subscribers to be transferred to Netflix, and promote Netflix's rental business absent substantial consideration from Netflix, such as an agreement not to compete for new DVD sales. But for the Market Division Agreement, Walmart.com would not have exited the Online DVD Rental Market when it did. Likewise, Netflix would not have foreclosed its opportunity to sell DVDs to its millions of subscribers—a base of customers who purchase on average 25 DVDs per year each—and would not have promoted new DVD sales by Wal-Mart Stores and Walmart.com, rather than its own sales, absent an agreement from them not to compete against Netflix's online rental business.

56. Wal-Mart Stores actively participated in this conspiracy. This is confirmed by, among other things, the fact that prior to the announcement of the Market Division Agreement, John Fleming was promoted to Chief Marketing Officer of Wal-Mart Stores. As of the time of the announcement of the Market Division Agreement, Fleming was therefore acting in his capacity both as Chief Marketing Officer of Wal-Mart Stores and the Wal-Mart Stores executive responsible for overseeing the operations of Walmart.com. As Chief Marketing Officer of Wal-Mart Stores, Fleming was responsible for deciding "what the largest, most powerful retailer in history will stock on its shelves, and how much those products will cost. Such decisions, when made at Wal-Mart, can help make or break entire industries."

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ANTICOMPETITIVE EFFECTS

57. Defendants' illegal acts and practices have caused anticompetitive effects in the Online DVD Rental Market. The subscription fees charged by Netflix to Plaintiff and other members of the Class were maintained at artificially high and supracompetitive levels. Plaintiff and the other members of the Class paid higher subscription fees to Netflix than they otherwise would have paid.

58. The Market Division Agreement (i) eliminated one of only three significant competitors in the Relevant Market; (ii) eliminated competition between Defendants; and (iii) enabled Netflix to acquire market power and also acquire and maintain monopoly power in the Relevant Market. The Market Division Agreement has enabled Netflix to implement monopolistic and supracompetitive pricing in the Relevant Market.

59. The Market Division Agreement and Defendants' acts and practices in furtherance thereof have no pro-competitive benefits. They do not create information that consumers need, nor do they create new or better products or services. Rather, they have served to reinforce the true anticompetitive nature of the Market Division Agreement by assuring, for example, that Walmart.com not only withdrew from the Online DVD Rental Market, but further enhanced Netflix's monopoly in that market. Even if there were any pro-competitive benefits, they would not outweigh any of the anticompetitive effects described herein, and could be achieved by less restrictive means.

VIOLATIONS ALLEGED

COUNT ONE

Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, By All Defendants
Illegal Market Division

60. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

61. Beginning at a time unknown to Plaintiff, but from at least May 19, 2005, and continuing through the present, Defendants entered into a continuing agreement, understanding,

and conspiracy in restraint of trade to allocate the markets for Online DVD Rental and new DVDs, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

62. Defendants have entered into a *per se* illegal market division agreement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Even if evaluated under the Rule of Reason, the Market Division Agreement is an unreasonable restraint of trade in violation of Section 1.

63. Defendants have committed overt acts in furtherance of their conspiracy, including entering into, complying with, and implementing the Market Division Agreement, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

64. Prior to and at the time of the agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market. In addition, Netflix on the one hand, and Wal-Mart Stores and Walmart.com on the other, were potential competitors in the new DVD sales market. Wal-Mart Stores and Walmart.com were actual participants and Netflix was a potential participant, with the means and economic incentive to sell new DVDs—in the absence of the Market Division Agreement.

65. Defendants shared a continuous commitment to a common scheme designed to achieve the unlawful objective of dividing the markets for online DVD rentals and new DVD sales. The Market Division Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and Walmart.com agreeing not to compete in that Relevant Market. The agreement also allocated new DVD sales to Wal-Mart Stores and Walmart.com, with Netflix agreeing to refrain from selling new DVDs in competition with them. In addition to explicitly or *de facto* agreeing not to sell new DVDs, Netflix also obtained the Market Division Agreement by providing potentially valuable promotion to Wal-Mart Stores and Walmart.com. In so doing, Netflix provided significant consideration to Wal-Mart Stores and Walmart.com for their agreement that Walmart.com would withdraw from, and both Walmart.com and Wal-Mart Stores would not compete in, the Online DVD Rental Market.

66. The Market Division Agreement alleged herein has created significant anticompetitive effects and no pro-competitive benefits. It eliminated competition in the

Relevant Market, and thereby raised prices paid by consumers. To the extent that there are any pro-competitive benefits at all resulting from Defendants' agreement, they do not outweigh the agreement's anticompetitive effects. And any pro-competitive benefits could have been achieved through less restrictive means.

67. During the Class Period, Plaintiff and Class members paid subscription fees to Netflix for the online rental of DVDs.

68. As a direct and proximate result of Defendants' illegal contract, combination and conspiracy, Plaintiff and the Class have been injured and will continue to be injured in their business and property by paying more for Netflix subscriptions than they would have paid in the absence of the combination and conspiracy.

69. Plaintiff and the members of the Class request three times their actual damages that resulted from Defendants' illegal conspiracy. The total amount of damages is presently undetermined.

70. Plaintiff and the Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

COUNT TWO

Violation By Netflix of Section 2 of the Sherman Act, 15 U.S.C. § 2 Monopolization of the Online DVD Rental Market

71. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

72. Netflix has monopoly power in the Online DVD Rental Market.

73. Netflix willfully acquired and maintained its monopoly in the Online DVD Rental Market by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Market Division Agreement, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

74. As a direct and proximate result of Netflix's unlawful monopolization in the Online DVD Rental Market, Plaintiff and the Class have been injured and will continue to be

injured in their business and property by paying more for Netflix subscriptions than they would have paid in the absence of the Netflix's unlawful monopolization.

COUNT THREE

Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, By Netflix Attempt to Monopolize the Online DVD Rental Market

75. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

76. If Netflix does not already have monopoly power, then Netflix has a dangerous probability of success in achieving monopoly power in the Online DVD Rental Market.

77. With the specific intent to achieve monopoly power, Netflix, by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Market Division Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

78. As a direct and proximate result of Netflix's unlawful attempt to monopolize the Online DVD Rental Market, Plaintiff and the Class have been injured and will continue to be injured in their business and property by paying more for Netflix subscriptions than they would have paid in the absence of Netflix's unlawful conduct.

COUNT FOUR

Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, By All Defendants Conspiracy to Monopolize Online DVD Rental Market

79. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

80. Defendants shared a conscious commitment and a common scheme designed to achieve the unlawful objective of monopolizing the Online DVD Rental Market. Prior to and at the time of the agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market. Defendants conspired with the specific intent, knowledge, and purpose that their anticompetitive agreement would result in Netflix willfully acquiring and maintaining a monopoly in the Relevant Market. Wal-Mart Stores and Walmart.com knew that the natural and probable consequence of the Market Division Agreement would be the monopolization of the

Relevant Market by Netflix. Defendants have committed overt acts in furtherance of their conspiracy, including entering into, complying with and implementing the Market Division Agreement, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

81. As a direct and proximate result of Defendants' unlawful conspiracy to monopolize the Online DVD Rental Market, Plaintiff and the Class have been injured and will continue to be injured in their business and property by paying more for Netflix subscriptions than they would have paid in the absence of the combination and conspiracy.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

A. That the Court determine that this action may be maintained as a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure;

B. That the Court adjudge and decree that Defendants' unlawful conduct, contract, combination and conspiracy as alleged herein violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2;

C. That the Court declare the Market Division Agreement between Defendants, as announced May 19, 2005, to be unlawful and null and void;

D. That judgment be entered against Defendants and in favor of Plaintiff and the Class she represents for treble damages as allowed by the Sherman Act, as determined to have been sustained by them, together with costs of suit, including reasonable attorneys' fees;

E. That Defendants, their co-conspirators, successors, transferees, assigns, parents, subsidiaries, affiliates, and the officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on behalf of Defendants, or in concert with them, be permanently enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the combinations, conspiracy, agreement, understanding or concert of action, or adopting or following any practice, plan, program or design having a similar purpose or effect in restraining competition;

F. That the Court award Plaintiff and the Class she represents attorneys' fees and costs, and pre-judgment and post-judgment interest as permitted by law; and

G. That the Court award Plaintiff and the Class she represents such other and further relief as may be necessary and appropriate.

JURY DEMAND

Plaintiff demands a trial by jury of all of the claims asserted in this Complaint so triable.

Dated: April 21, 2009 By: [signature]

Mario N. Alioto (56433)
Lauren C. Russell (241151)
TRUMP, ALIOTO, TRUMP & PRESCOTT, LLP
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200
Facsimile: (415) 346-0679
malioto@tatp.com ; laurenrussell@tatp.com

Joseph M. Patane (72202)
LAW OFFICES OF JOSEPH M. PATANE
2280 Union Street
San Francisco, CA 94123
Telephone: (415) 563-7200
Facsimile: (415) 346-0679
E-mail: jpatane@tatp.com

Sherman Kassof (66383)
Law Offices of Sherman Kassof
954 Risa Road, Suite B
Lafayette, CA 94549
Telephone: (510) 652 2554
Facsimile: (510) 652 9308
Email: heevay@att.net, heevay@yahoo.com

Attorneys for Plaintiff Adrienne Belai
And All Others Similarly Situated